PATTERNS OF POWER · FROM A TREATY TO A GOVERNMENT

TO THE CONTRARY NOTWITHSTANDING

A companion study · From a Treaty to a Government · 1781 — 1787 — 1791

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held as tested, not revealed

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A case study in the Patterns of Power series.
Primary sources quoted exactly; modern scholarship paraphrased and credited.
Contested figures given as ranges. Nothing reconstructed from memory.

COMPANION STUDY

To the Contrary Notwithstanding

From a treaty to a government, 1781–1791 — thirteen sovereign English hierarchies who needed everything a monarchy had given them and would submit to nothing; a rebellion that had to be suppressed by private subscription because no government had the money; and a constitution whose central device is the exact clause the English Bill of Rights had declared void

What the Articles actually were

The first instrument the states made for themselves was not a constitution and does not read like one. It reads like what it was: a treaty of alliance between sovereigns, drafted in the vocabulary of the law of nations rather than the law of England.

> ***Article II.*** *Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.*
> ***Article III.*** *The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.*

Every phrase in that is technical.

Retains is the language of a reservation in a treaty: nothing is granted away except what is named. **Expressly delegated** is a rule of construction — the tightest one available — and it was put there deliberately: Thomas Burke of North Carolina moved it in 1777 precisely because the draft as it stood would have let a future Congress explain away the states' rights, and Congress adopted it eleven states to one.

A firm league of friendship is not a constitutional formula at all. It is the standard term of art for a treaty of alliance, and it is what the states were: thirteen sovereign polities, each with its own written constitution, its own legislature, its own courts, its own established or disestablished church, its own land law, its own currency and its own customs house.

And they were English hierarchies. Every one of them was governed by men formed in English law, holding property under titles descending ultimately from English crown

grants, sitting in assemblies modelled on the House of Commons, and applying the common law with such local variations as their own statutes made. They had just spent eleven years arguing that they possessed the whole inheritance of an Englishman, and they had won. What they were not going to do, having won it, was hand it to anybody.

The consequence, stated in the terms this collection uses: **the Articles created a coordination mechanism with no floor and no forum.** Congress could resolve, requisition and recommend. It could not tax, could not regulate commerce, could not compel a state to do anything, and could not be amended except by the unanimous consent of thirteen legislatures. There was no executive and no judiciary. Nine states of thirteen were required for any consequential measure, and each state had one vote regardless of size.

Why a treaty cannot govern

The failure that followed is usually told as a list of inconveniences. It is better understood as a single legal defect, and the man who diagnosed it did so in a private memorandum in April 1787, two months before the Convention met.

James Madison's *Vices of the Political System of the United States* runs to twelve headings. The first is the failure of the states to comply with requisitions. Others are encroachments on federal authority, violations of the law of nations and of treaties, trespasses of the states on each other's rights, want of concert where common interest required it, and want of guaranty to the states against internal violence.

The seventh is the diagnosis:

> ***7. want of sanction to the laws, and of coercion in the Government of the Confederacy.*** *A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution.*

And elsewhere in the same memorandum he draws the consequence from the law of treaties:

> *As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power, so far it seems to follow from the doctrine of compacts, that a breach of any of the articles of the confederation by any of the parties, absolves the others.*

That is the whole problem in two sentences, and it is a lawyer's problem, not a politician's.

A treaty binds states. A law binds persons. A treaty's only sanction is the aggrieved party's release from its own obligations, and its only remedy is war. A law's sanction is a court, a sheriff and a gaol, applied to a named individual. Congress under the Articles could pass what it liked; the object of its acts was thirteen sovereigns, and there existed no tribunal above them, no officer who could serve process on them, and no force that could compel them. When Rhode Island declined to agree to a five per cent impost, the impost died, twice, and there was nothing to be done about it.

So the structural pressures accumulated with nothing to relieve them, and they are the pressures any society generates as it grows and every society must solve somehow. Goods crossing from New Jersey into New York paid duties to New York; New York's harbour taxed Connecticut firewood; Connecticut and New Jersey retaliated. Nine states kept navies. Seven issued paper money. Congress could conclude a commercial treaty and could not make a state honour it, which the British government noticed and used, declining to evacuate the western posts partly on the ground that the states were not honouring the peace treaty's provisions about debts and loyalist property. Congress requisitioned and received a fraction. The Annapolis Convention of September 1786, called to address commerce, drew delegates from five states and adjourned with a call for a broader meeting.

Stated for the card: a confederation of sovereigns has no forum, and the absence is not a defect of design but the definition of the form. The companion study on the imperial crisis found that a legal argument in which one party is also the sovereign legislature has no forum and therefore terminates in force. This is the same finding with the parties multiplied: where *every* member is sovereign and none is superior, there is no forum at all, and the arrangement can be maintained only by unanimity, hegemony, or the constant threat of dissolution. The Articles had none of the three.

Shays, and the discovery that there was no power

Then, in the autumn of 1786, the propertied men of Massachusetts discovered what the absence of a floor actually meant for them personally.

The state had taken a hard-money course: heavy taxation in specie to retire its war debt, no paper emission, and courts of common pleas working steadily through foreclosure and debt actions against farmers in the western counties who had been paid in depreciated currency and had no specie at all. From August the farmers — calling themselves Regulators, after the Carolina movement of the 1760s — began closing the

courts by standing in front of them in arms. Massachusetts passed a Riot Act and suspended habeas corpus.

On 25 January 1787 something between twelve and sixteen hundred men under Daniel Shays approached the federal arsenal at Springfield, intending to take the weapons in it.

Two facts about the suppression are the reason this episode changed the political nation's mind, and both are fiscal.

The federal government could not act. Congress voted troops under a pretext of an Indian expedition and could not fund them; the requisitions produced almost nothing. Henry Knox negotiated for a force and got nowhere. The federal arsenal at Springfield was defended by state militia because the confederation that owned it had no soldiers of its own.

And the state could not act either. Massachusetts was insolvent. So Governor Bowdoin raised a private subscription: Benjamin Lincoln solicited the merchants of Boston and collected upwards of six thousand pounds from more than a hundred and twenty-five of them — Bowdoin himself putting in two hundred and fifty pounds of his own money — and with it hired an army of some three to four thousand men, which marched west and dispersed the Regulators.

The suppression of an armed rising against property in the United States of America in 1787 was paid for by a whip-round among Boston merchants, because no government on the continent had the money.

Everything after that follows. The framework's account of the default holds that a hierarchy defends an arrangement because each man defending his own position defends the whole — and that the arrangement must therefore be able to reach and protect those positions. What the winter of 1786–87 demonstrated to every creditor, merchant, bondholder and landholder from Boston to Charleston was that the arrangement could not reach them at all: that a majority in a state legislature could impair their contracts, emit paper and make it legal tender, and that if the majority went out of doors instead, nobody would come.

Congress called the Philadelphia Convention in February 1787, four weeks after Springfield.

The move: from a law that binds states to a law that binds persons

The problem the Convention faced was exactly stated and the solution to it is the single most consequential legal idea in the document.

They needed everything a monarchy had supplied: a common market, a single external policy, a fiscal capacity that could carry debt, a force that could be called out

against insurrection, and a court of last resort whose judgments ran everywhere. And they were thirteen sovereignties which had just fought a war rather than submit to a superior, whose ruling classes distrusted each other, and who would ratify nothing that put any one of them under the others.

The Virginia Plan's early answer was a congressional veto on state laws and, in some versions, force against a delinquent state. Madison wanted the veto badly. It was rejected, and its rejection was correct, because coercion against a state is war — as Madison himself observed, an application of force against a state would look more like a declaration of war than an execution of law, and would probably be received as such.

So they went round it, and the move is this:

Stop legislating about states. Legislate about persons.

The Constitution's powers operate directly on individuals. Congress lays and collects taxes from taxpayers, not requisitions from states. It regulates commerce, and its regulations bind merchants. Federal courts try individuals. Federal officers serve process on individuals. A state is not the object of federal law at all in the ordinary case, and therefore never has to be coerced: the citizen is reached over the state's head, by a judge, with a marshal.

That is the conversion of a treaty into a government, and it is a change in the *object* of the law rather than in the quantity of power. It is why the Constitution needed no army to enforce itself in ordinary times, and it is why the Articles would have needed one.

Stated for the card: a confederation acquires the properties of a government at the moment its instrument stops operating on its members and starts operating on individuals within them. Where a study finds a league that endured, look for that conversion; where it finds one that dissolved, expect to find the conversion attempted and refused. A treaty has one sanction, which is release, and one remedy, which is war. A law has a sheriff.

The clause that carries it, and where it came from

For that to work, one thing had to be true: where federal law and state law collide, federal law must win, and it must win **in the state's own courts**, since there were not going to be federal courts in every county.

Article VI:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the*

> *Judges in every State shall be bound thereby,* ***any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.***

That final clause is a *non obstante* — "notwithstanding" — and it is one of the oldest instruments in English public law. It is the formula by which an English king, granting a charter or a licence, provided that the grant should stand *non obstante* any statute to the contrary: a clause of dispensation, disapplying the general law in a particular case by the authority of the granter.

And its history in England is exact, because it is the device the Revolution of 1688 was fought over.

James II's dispensing power was exercised by *non obstante* clauses. *Godden v Hales* in 1686 upheld a commission granted notwithstanding the Test Act. The Declaration of Rights condemned the assumption and exercise of a power of dispensing with laws and the execution of laws without consent of Parliament. And the second section of the Bill of Rights disposed of the instrument itself:

> *that from and after this present session of Parliament no dispensation by non obstante of or to any statute or any part thereof shall be allowed, but that the same shall be held void and of no effect*

The English settlement of 1689 declared the non obstante void. The American settlement of 1787 made it the hinge of the constitution.

There is no contradiction, and reading it as irony misses what happened. The clause was never good or bad in itself; it is a tool for establishing which of two conflicting laws prevails, and the whole question is who holds it. In 1686 it was in the hands of a king dispensing with statutes made by Parliament, which is a prerogative overriding a legislature. In 1787 it was written into an instrument ratified by conventions of the people, disapplying state law in favour of law made by a legislature the states elect. The framers took the sharpest instrument in the English constitutional toolbox, the one their own tradition had outlawed a century earlier, and pointed it in the other direction.

That is what a legal tradition is *for*, and it is why the argument about whether these men were innovating or inheriting is badly posed. They were doing what every English lawyer of the period did: reaching into a common stock of devices, each with a known operation and a known history, and assembling the one arrangement that would answer their problem.

Going round Article XIII

One legal obstacle remained and it was formally insuperable.

Article XIII of the Confederation provided that the union be perpetual, that no alteration be made unless agreed to in Congress and **afterwards confirmed by the legislatures of every state.** Rhode Island, which had blocked the impost twice, sent no delegates to Philadelphia at all. Unanimity was not going to be had.

The Convention's own authority was narrower still: Congress had called it, in February 1787, "for the sole and express purpose of revising the Articles of Confederation."

Article VII of what they produced:

> *The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.*

Nine, not thirteen. And by **conventions**, not by the legislatures Article XIII named.

Both departures were deliberate and the second is the more important, because it is the fiction that solves the sovereignty problem.

A state legislature is a creature of its own state constitution. It exercises delegated powers and it cannot alienate the sovereignty of the body that created it — a proposition every lawyer in the room understood, and one that would have given every state legislature a permanent argument for treating the new instrument as revocable. A **convention** elected for the single purpose of ratifying can do what a legislature cannot, because it is not exercising delegated authority; it is standing in for the source. Hence the preamble does not read *We the States* but *We the People of the United States* — which was drafted, in part, because a list of states would have been wrong once nine sufficed, and which had the further effect of naming an authority above the states.

So: an instrument that could not lawfully be amended was replaced by appealing over the head of the body whose consent it required, to a source of authority that body did not control, and constituting a set of assemblies to speak for that source.

Stated for the card, as an addition to the catalogue of settlement fictions: the appeal over the head of the grantor. Where an instrument's own amendment rule makes necessary change impossible, expect the operators to go round it by invoking an authority the instrument does not regulate, and to constitute a body ad hoc to speak in that authority's name. The tell is a new enacting formula: the document will name a principal it did not previously recognise.

The companion study found the identical structure in 1689: an assembly summoned by letters bearing no seal and no royal authority, which debated on its first day what authority it had to sit at all, and justified itself on the precedent of the

convention that had recalled Charles II — itself summoned without writs by a general marching south. In both cases the lawful route was closed, in both cases a convention was the instrument, and in both cases the resulting settlement then had to be drafted so that no future claimant could use the same route.

The treaty inside the constitution

Having built a government, they still had to agree its terms, and the terms are a treaty — negotiated between three regional hierarchies whose interests were not merely different but in several places directly opposed, and each of whom needed protection from the others.

The northern merchants wanted a national commercial policy: navigation laws that would reserve the carrying trade, a power to retaliate against British and French restrictions, a stable currency, and enforceable contracts.

The Virginia and Chesapeake planters wanted no taxes on their exports, a western settlement that would validate their land claims, and — increasingly — no disturbance of a labour system many of them were uneasy about and none of them proposed to end.

The Carolina and Georgia low country wanted the slave trade kept open, and wanted it more than it wanted anything else. South Carolina's plantation society had been founded from Barbados in 1670, and its slave code descended from the Barbados code; it was, in origin and in structure, a West Indian colony that happened to be on the mainland. Its delegates said plainly that their states would not accede without protection for the trade.

The bargains are legible on the face of the document.

Representation. The Connecticut Compromise: a House apportioned by population and a Senate with two votes per state regardless of size. That is the treaty clause — the small states' guarantee that they would not be absorbed — and it is the one provision of the Constitution that cannot be amended without a state's own consent.

The three-fifths ratio, Article I section 2, counting three-fifths of "all other Persons" for both representation and direct taxation. It was not invented in 1787; it came off the shelf from a proposed 1783 amendment to the Articles for apportioning requisitions, where it had been a formula for taxing wealth. In Philadelphia it was moved onto representation as well, which converted a tax rule into a grant of political power to the men who owned the persons counted.

The slave trade, Article I section 9: no prohibition of "the Migration or Importation of such Persons as any of the States now existing shall think proper to

admit" before 1808. Twenty years, bought by South Carolina and Georgia, in exchange for the northern demand that navigation acts pass by simple majority rather than the two-thirds the southern states wanted.

No export taxes, Article I section 9 — the planters' clause, and the reason a national revenue had to come from imports.

And the fugitive slave clause, Article IV section 2:

> *No Person held to Service or Labour in one State, **under the Laws thereof**, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*

Read the four words in the middle, because they are a legal citation.

In 1772, in *Somerset v Stewart*, Lord Mansfield had held that slavery is of such a nature that nothing can be suffered to support it but **positive law** — that is, that a slave's status exists only where a statute or settled local law creates it, and does not travel. On that rule, a person held in Virginia and reaching Pennsylvania, whose legislature had begun gradual abolition in 1780, would be free on arrival, because Pennsylvania's law did not support the status.

Under the Laws thereof concedes Mansfield's premise exactly — the status is a creature of the law of the particular state and of nothing else — and then, by constitutional provision, denies its consequence. The clause is drafted by men who knew *Somerset* and knew what it did.

So one of the three great compromises of the American founding is a constitutional reversal of a decision of the Court of King's Bench, and it is drafted in the technical vocabulary of that decision. The same case that had appeared, fifteen years earlier, as an inconvenience to colonists pleading the rights of Englishmen, reappears here as a problem to be legislated round.

No blank slate

It is often said that these men had a blank page. They had nothing of the kind, and the study's premise is that they could not have wanted one.

They were formed. They were educated English gentlemen, which in the eighteenth century meant Latin, some Greek, a great deal of Roman history, and — for the many of them who were lawyers — Coke's *Institutes* and Blackstone's *Commentaries*, which sold in America in numbers Burke thought comparable to sales in England, and which

was the single most influential book in the American legal profession of that generation.

What they reached for, they reached for because it was to hand:

From the English constitution. Bicameralism. A lower house with the exclusive right to originate money bills, which is the Commons' ancient privilege. Impeachment by the lower house and trial by the upper, which is the English procedure exactly. The prohibition of a pardon in cases of impeachment, which answers Charles II's pardon of Danby in 1679 and was first enacted in the Act of Settlement of 1701. Legislative immunity for speech and debate, in words that track the Bill of Rights of 1689 almost exactly. Habeas corpus, and a suspension clause. Two-year appropriations for the army, which is the Mutiny Act device by another name. Judicial tenure during good behaviour with salaries that cannot be diminished, which is the Act of Settlement's clause.

From English criminal law. The treason clause, Article III section 3, is a compound of two English statutes: the definition — levying war, adhering to enemies — is the Statute of Treasons of 1351, and the requirement of two witnesses to the same overt act, or confession in open court, is the Treason Trials Act of 1696. The prohibition of bills of attainder, in both Article I section 9 and section 10, forbids to Congress and to every state the exact instrument by which the English Parliament killed Sir John Fenwick in 1696 when its own two-witness rule proved inconvenient. The framers knew that story.

From the classical and continental stock. Madison prepared for the Convention by writing a research memorandum on ancient and modern confederacies — the Amphictyonic and Achaean leagues, the Swiss cantons, the United Provinces, the Germanic body — and the *Federalist* papers on the subject are a survey of how each of them failed. The separation of powers came through Montesquieu, who had derived it, wrongly but influentially, from his reading of the English constitution.

And from their own colonial law. Written charters as fundamental law; assemblies with the power of the purse; a governor with a veto; and the practice, unknown in England, of a superior body reviewing colonial statutes for repugnancy to the law of England — which is the direct institutional ancestor of judicial review.

Stated plainly: the Constitution is an English constitutional document, written by Englishmen, out of English and classical materials, to solve a problem English constitutional practice had solved with a monarchy. What they wanted was what the crown had supplied — a single external policy, a common market, a fiscal capacity, an ultimate court, and a force that could be called out. What they would not

have was a crown. So they built a substitute out of the parts, and the parts came from the shop they had been trained in.

The Bill of Rights, and the qualifiers that were removed

The last element is the ten amendments of 1791, and they contain a finding that extends what the companion study established about how liberties accumulate.

Set the two documents side by side.

1689: *That excessive baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.* **1791:** *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

That is a re-enactment, almost word for word, with one change: *ought not to be* becomes *shall not be*. The English clause is declaratory; the American is mandatory, and enforceable in a court against the legislature. That difference is the whole of what a written constitution adds.

1689: *That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.* **1791:** *the right of the people to keep and bear Arms, shall not be infringed.*

The religious test is gone. The class qualification — *suitable to their Conditions* — is gone. The saving clause that let any statute override it is gone.

1689: *That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall.* **1791:** *the right of the people... to petition the Government for a redress of grievances.*

The companion study on the English settlement found that liberties accrete because a faction wins a protection out of its own fear and the draftsman writes it in general terms, and the general words outlive the fear and are later picked up by people the original faction would have refused. That mechanism is passive: the widening happens by default because nobody bothered to be specific.

This case shows the active version. **A protection can be widened by re-enactment with the qualifiers stripped** — and the stripping is done deliberately, by a body drawn from a broader constituency than the original, and needing ratification by conventions in nine states. The men of 1689 were an English Protestant political nation legislating against a Catholic king, and they wrote *Protestants* into the arms clause because that was who they were. The men of 1791 needed ratification from Baptists in Virginia and Quakers in Pennsylvania and Catholics in Maryland, and the religious test came out.

The residue mechanism therefore has two speeds. Generality of drafting widens a protection slowly, by accident, over centuries. Re-enactment before a

wider ratifying body widens it at a stroke — and the width of the new text is a direct measure of how broad the constituency was whose consent the drafters needed.

And the honest counterweight, which must be stated in the same breath, because it is the same men in the same rooms in the same five years.

The document that removed the word *Protestant* from the right to bear arms wrote three protections for chattel slavery into the frame of government: the three-fifths ratio, a twenty-year guarantee for the Atlantic trade, and a clause reversing *Somerset* for fugitives. The circle of the protected was widened along one axis by deleting a religious test, and hard-coded closed along another by constitutionalising a property in persons. Both operations were performed by the same convention, in the same summer, and there is no version of the first that does not come attached to the second, because the second was the price of the Carolina and Georgia signatures.

That is the same finding the companion study reached about England: the goods and the costs come out of one mechanism, not two. A coalition legislating its own fears and its own interests produces protections of remarkable quality for the dangers it can imagine running, and nothing at all for the people whose dangers it cannot — and here it produced something worse than nothing, because the people concerned were not absent from the negotiation but present in it, as its subject matter.

Reading the founding against the framework

The principal contribution concerns the transition from league to government.

A confederation acquires the properties of a government at the moment its instrument stops operating on its members and starts operating on individuals within them. A treaty binds sovereigns; its only sanction is release from obligation and its only remedy is war, which is why Madison wrote that a breach by one party absolves the others and why he identified *want of sanction to the laws, and of coercion in the Government of the Confederacy* as the vice from which all the others followed. A law binds persons; its sanction is a court and a marshal, and it requires no army in ordinary times.

Where a study finds a league that endured, look for that conversion and date it. Where it finds one that dissolved, expect to find the conversion attempted and refused — and expect the refusal to have been framed, correctly, as a defence of sovereignty.

Three findings compound.

A confederation of sovereigns has no forum, and this is the form's definition rather than its defect. The companion study on the imperial crisis found that a legal argument in which one party is the sovereign legislature cannot be heard and therefore

ends in force. Multiply the sovereigns and the position is worse: there is no superior at all, so the arrangement runs on unanimity, hegemony, or the standing threat of dissolution. A confederation that has none of the three is not weak; it is incomplete, and the pressures of commerce and defence will complete it or break it.

The appeal over the head of the grantor is a settlement fiction and belongs on the list. Where an instrument's amendment rule makes necessary change impossible, the operators will invoke an authority the instrument does not regulate and constitute a body to speak in its name. The tell is a change in the enacting formula: the new document names a principal the old one did not recognise. Article XIII required thirteen legislatures; Article VII took nine conventions; and the preamble named the People. The English Convention of 1689 did the same thing with the same instrument for the same reason, and both settlements then had to be drafted so that nobody could use the route again.

And the residue mechanism has an active speed. Liberties widen slowly by generality of drafting and quickly by re-enactment before a broader ratifying body, with the original's qualifiers deleted. The 1791 arms clause is the 1689 arms clause with the religious test, the class qualification and the saving clause removed; the excessive-bail clause is the same words with *ought not* raised to *shall not*. **The width of a re-enacted protection measures the breadth of the constituency whose ratification the drafters needed** — which is a variable a study can check, and which predicts, in this case, both what was removed and what was left in.

A closing observation, because the popular account of this founding is one of the most durable robes in the collection and it should be named as one.

The Constitution was not drafted by minutemen. It was drafted by fifty-five men, most of them lawyers, planters and merchants, a majority of them creditors of the government they were replacing, meeting in secret, four months after an armed rising against property had been suppressed by a private subscription because no government could pay for it. What they built was a machine for doing what a monarchy does — coordinating a continent, carrying a debt, holding a market open, putting down an insurrection, and speaking with one voice abroad — assembled out of English constitutional parts by men who could not have thought in any other vocabulary, and constrained at every point by the terms three regional hierarchies would accept from each other.

None of which makes it less of an achievement, and this study will not pretend otherwise. The conversion of a treaty into a government without a conquest and without a monarch had not been done before and has rarely been done since; the parts they took from England were the best parts, and several of them were improved in the

taking; and the instrument they produced has outlasted every constitution written since.

But it was a build, made by identifiable men for identifiable reasons, in a room, in one summer, out of materials that were to hand. Naming the build is not debunking it. It is only declining to let the founding be described in the vocabulary the founders' descendants chose for it, rather than in the vocabulary the founders themselves used — which was, from first to last, the vocabulary of English law.

A note on sources. Quoted exactly from public-domain primary texts: the Articles of Confederation, at Article II and Article III in full, from the National Archives transcription; James Madison, *Vices of the Political System of the United States* (April 1787), at heading 7 and its comment "A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution", and at the passage on the doctrine of compacts, from the text at Founders Online as reproduced by Encyclopedia Virginia; the Bill of Rights 1689, at section 2, "no dispensation by non obstante of or to any statute or any part thereof shall be allowed, but that the same shall be held void and of no effect", and at the arms, excessive bail and petition clauses; the United States Constitution, at Article I sections 2, 6, 7, 8, 9 and 10, Article III section 3, Article IV sections 2 and 4, Article VI and Article VII; and the First, Second and Eighth Amendments. Lord Mansfield in *Somerset v Stewart* (1772) is quoted in the companion study on the imperial crisis and referred to here.

Paraphrased and credited to modern scholarship or drawn from the standard reference literature: Thomas Burke's authorship of the "expressly delegated" reservation in Article II and the vote adopting it; the interstate commercial disputes of the 1780s, the failure of the impost, and the Annapolis Convention; the course of Shays's Rebellion, including the Massachusetts Riot Act and suspension of habeas corpus, Congress's inability to fund troops, and Benjamin Lincoln's raising of upwards of £6,000 from more than 125 Boston merchants with Governor Bowdoin subscribing £250 of his own; the congressional resolution of February 1787 calling the Convention for the sole and express purpose of revising the Articles; the rejection of the congressional negative on state laws and Madison's own reasoning against coercing states; the origin of the three-fifths ratio in the proposed requisition amendment of 1783; the Barbadian settlement of South Carolina in 1670 and the descent of its slave code; the commerce and slave-trade bargain between the New England and Deep South delegations; Madison's *Notes on Ancient and Modern Confederacies* (1786) and the confederation essays in *The Federalist*; the standing of Blackstone's *Commentaries*

in the American legal profession; and the colonial practice of review for repugnancy as an ancestor of judicial review.

Contested and uncertain points are flagged. **The reading of the Supremacy Clause as a non obstante clause in the English tradition, and the juxtaposition with the Bill of Rights' abolition of the device, is this study's argument**; the formula's descent is not disputed, but no framer has been quoted here observing the connection, and it should not be represented as a recovered intention. The attribution of the fugitive slave clause's phrase "under the Laws thereof" to a deliberate answer to *Somerset* is likewise an argument from the drafting; the framers' awareness of *Somerset* is well attested in the scholarship, but the specific drafting intent is inferred. Burke's remark in the Speech on Conciliation about sales of Blackstone in America is famous, is paraphrased rather than quoted here, and its exact wording should be checked before it is relied on. Figures for Shays's Rebellion vary between accounts — the private army is given at 3,000 and at 4,400, and the rebel force at Springfield at 1,200 and at 1,500 — and none is asserted. The claim that a majority of the Philadelphia delegates were public creditors follows a well-known and much-disputed line of scholarship descending from Beard, whose broader economic-determinist thesis has been substantially refuted; this study relies only on the uncontested fact that many delegates held public securities and does not adopt Beard's argument. Finally, the account of the Convention as a negotiation between three regional blocs is a simplification: the small-state and large-state division cut across the sectional one, several delegations were internally split, and the deep South itself was not united on the slave trade, with Virginia's delegates arguing for prohibition. Every load-bearing fact in this study is to be re-verified against a primary or standard source before it is built upon.